

February 26. 1766.

A N S W E R S
F O R

Helen Blackwell, Executrix of the deceased Doctor
John Johnston, Professor of Medicine in the U-
niversity of *Glasgow*, her Uncle;

T O

The PETITION of *Robert Blackwell*.

THE question that now falls to be determined by your Lordships, is, Whether the sum of 6000 merks, contained in a bond of provision, granted by Dr Johnston to his grand-niece, Christian Hay, must be considered as a burden upon the Doctor's heritable estate, to which the petitioner succeeds, in virtue of a settlement made in the year 1747, or as a burden upon his moveable subjects, to which the respondent has right as executrix?

The Lord Auchinleck Ordinary, by three several interlocutors, found it to be a burden upon the heritage; and to these interlocutors your Lordships adhered, upon the 4th current.

The petitioner has again reclaimed; and your Lordships having appointed the petition to be seen, these answers are humbly offered upon the part of the respondent.

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To enable your Lordships to form a just idea of this question, it will only be necessary to consider the different settlements made by Dr Johnston in favour of the respective parties; and, in order to save the trouble of looking back to the petition, these shall be fully stated.

It will not however be improper, in the entrance, to observe, that as Dr Johnston lived and died a bachelor, and as his fortune was not so opulent as to impress him with the foolish idea of establishing a family, so he seems to have resolved, that, in the distribution he was to make of his effects, his numerous relations should all share of his bounty, in a greater or a smaller degree.

Such being the general plan of settlement which he had in view, he began with the land-estate, which he destined to his sister in liferent, and to his nephew, Professor Blackwell, in fee; and as these lands, for which he is said to have been offered L. 2000 Sterling, made the most considerable part of his fortune, he resolved to burden them with L. 200 Sterling to his niece Christian Blackwell, and 6000 merks to his grand-niece Christian Hay.

With this view, he executed a deed, upon the 23d of November 1747; by which he disposed to and in favour of his sister Christian Johnston, relict of Mr Thomas Blackwell, in liferent, and to Thomas Blackwell their eldest lawful son, his heirs or assigns whatsoever, heritably and irredeemably, in fee, with and under the burdens and reservations therein mentioned, his lands of Grange and others.

By this deed, he likewise disposed to the said Thomas Blackwell his nephew, under the same burdens, provisions, and limitations, all other lands, tenements, debts heritably secured by infestment, adjudication, or other real security, and all other heritages whatsoever, with a particular conveyance of a decret of adjudication against Mr
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Crawford of Jordon-hill, and of his interest in two other adjudications obtained against the Viscount of Gar-nock; " Providing always, as it is hereby provided and
 " declared, That the said Mr Thomas Blackwell my ne-
 " phew, *and the subjects before disposed to him*, (but not the
 " liferent in favour of my said sister), are and shall be
 " *burdened* with the payment of the sum of £. 200 Ster-
 " ling money to Christian Blackwell my niece, and of the
 " sum of 6000 merks Scots money to Christian Hay my
 " grand-niece, who lives in family with me, and of the
 " annualrent of the said two sums and penalties if incur-
 " red; and a further yearly sum of 100 merks Scots
 " money to the said Christian Blackwell my niece, while
 " she remains unmarried, in terms of the two several
 " bonds granted by me to them, of the date of these pre-
 " sents, and of the payment of what further sums I shall
 " think fit, by a writing under my hand, at any time in
 " my life, or even on death-bed, to burden the said
 " Thomas Blackwell my nephew, and the subjects before
 " disposed to him."

Of the same date with this deed, the Doctor execu-
 ted the two bonds to Christian Blackwell and Christian
 Hay, mentioned in the clause above recited, payable at
 the first term of Whitsunday or Martinmas after his death.

The respondent being the doctor's chief favourite a-
 mongst his relations, he, at the same time, executed a bond
 in her favour, whereby, as she has been credibly informed,
 he provided to her no less than £. 1000 Sterling: But as
 he sometime thereafter, upon the occasion of Christian
 Blackwell's marriage, became bound to give her 3000
 merks of tocher, and made a posterior settlement in favour
 of the respondent; so it appears, that the £. 200 bond
 to the said Christian Blackwell, and the £. 1000 bond to
 the respondent, were destroyed.

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In the year 1757, Dr Johnston resolved to compleat the intended settlement and distribution of his whole fortune. At this time his sister, and her son Professor Blackwell, to whom the liferent and fee of his land-estate were respectively provided were dead. With regard to the fee, the Doctor made no alteration, allowing it to go to the petitioner, as the heir of Professor Blackwell. But as he had destroyed the bond of provision which he had granted to the respondent, he, in lieu thereof, substituted her, in the place of her mother, in the liferent of the lands, by a deed bearing date the 8th of March 1757; in which he likewise assigned to her his whole moveable goods, gear, and effects, and all and sundry debts and sums of money, heritable as well as moveable, that should be resting and pertaining to him at his death.

By this deed, the respondent was burdened with the payment of certain legacies and annuities; and she was likewise taken bound, by her acceptance thereof, to pay all the Doctor's just debts, and perform every deed he had come under, or might at any time in his life come under, whether gratuitous or onerous.

That Dr Johnston intended, by this deed, to give the the respondent a particular mark of his favour in the distribution of his effects, cannot be doubted. But as, in the latter part of his life, his faculties were greatly impaired, advantage was taken of his weakness, by those who were about him, and he was induced to execute several deeds of donation, by which so many burdens have been imposed upon the respondent, that as her liferent of the lands is altogether exhausted by payment of annuities, so, were she to be burdened with the 6000 merks payable to Christian Hay, the free executry remaining to her would not be found to exceed the sum of L. 80 Sterling, when, at the same time, other relations of the Doctor, to whom he never showed so strong a degree of affection, have

have acquired very tolerable fortunes through his bounty.

It only remains, in the way of narrative, to inform your Lordships, that, upon the 10th June 1761, the Doctor executed a bond of provision, wherein he obliged the petitioner to pay to his sister Margaret Blackwell £ 200 Sterling, upon the succession to the lands fully opening to him through the death of the annuitants.

Such being the history of the Doctor's settlements, the respondent will now proceed to consider the effect that these settlements must have upon the present question: In doing which, she proposes, in the *first* place, to show, That this debt of 6000 merks due to Christian Hay, was originally made a burden upon the land-estate; and thereafter to endeavour to satisfy your Lordships, that the Doctor never made, or meant to make any alteration of this his original intention.

In order to prove the *first* of these propositions, it will be sufficient to look to the words of the deed 1747, whereby not only the disponent personally, but the lands themselves, are particularly burdened with the payment of this debt. The lands are disposed *with and under the burdens and reservations underwritten*; and one of these burdens is, " That the said Mr. Thomas Blackwell, my nephew, and " the *subjects before disposed to him*, but not the liferent in " favour of my said sister, are and shall be burdened with " the payment of 6000 merks Scots to Christian Hay my " grand-niece." It was the Doctor's intention to give each of his relations a share in the distribution of his fortune: And as his land-estate was the most considerable part of that fortune he resolved to burden the fee of it with the payment of this debt, and another provision of £ 200 to his niece Christian Blackwell, and to reserve his executry, or moveable subjects, as a fund to answer such provisions

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as he should make in favour of his other relations ; and as this was undoubtedly his purpose, he could not possibly have used stronger words to express this purpose.

Nor will it make any difference, that, in the year 1754, Dr Johnston transacted the three adjudications, which were particularly conveyed to Professor Blackwell by the deed 1747. For as the whole of the subjects contained in that deed, were burdened with the payment of the two bonds granted to Christian Blackwell and Christian Hay, so, if the Doctor had died before making any other settlement, the professor; this alteration notwithstanding, must either have repudiated the deed in his favour, or have agreed to pay the burdens imposed by it ; of one of which he was however relieved, by the Doctor's having cancelled the bond to Christian Blackwell, upon his binding himself, at her marriage, to give her 3000 merks of tocher.

Taking it then for granted, that the burden of this debt of 6000 merks was originally laid upon the heir who was to succeed to the fee of the land-estate, it only remains to be considered, Whether by the posterior settlement in favour of the respondent, that burden was transferred upon her.

Upon this branch of the argument, the petitioner lays considerable stress upon that part of the deed 1757, in favour of the respondent, by which she is taken bound " to pay all the Doctor's just debts, and to perform every deed he had come under, or might at any time in his life come under, whether gratuitous or onerous."

The respondent, however, apprehends, that this clause can by no means suffer that construction which the petitioner would put upon it. It is a principle of law, *Quod generi per speciem derogatur*. If one makes a special bequest of a particular subject to A. and thereafter makes a general bequest to B. without expressly revoking the former special bequest, it is a clear case, that the general implies

implies no revocation of the special; and by the same rule, where a special burden is imposed upon a particular subject, or a particular heir, a general disposition, in favour of another person, with the burden of debts in general, will neither be understood to revoke the former special disposition, nor to relieve that special subject or person, from the special burden with which that person or right was formerly burdened.

The application of this rule to the case in hand is obvious. The Doctor, by the disposition of his lands to his sister in liferent, and to her son Thomas Blackwell in fee, did not only take the said Thomas Blackwell, and his heirs, personally bound to pay this particular bequest of 6000 merks to Christian Hay, but also declared the lands themselves to be burthened therewith; and as it thereby became a real lien against the disponent, the after settlement of his personal estate, in favour of the respondent, with the special burdens therein contained, and the general clause subjecting her personally to the payment of all his debts, and performance of all his deeds, could not have the effect to transfer upon her the burden of this particular bequest, which, by the disposition of his lands, he had expressly imposed upon that estate; nor will it make any difference, that, by this deed in the year 1757, the respondent was likewise provided to the liferent of the lands; for, in this particular, she was only substituted in the place of her mother: And as she was, by that deed, burdened with an annuity of *L. 20* to Janet Blackwell, the relict of Hay, so, by other annuities granted by the Doctor, her whole liferent is exhausted, except to the extent of *L. 2 per annum*, which will not defray the public burdens and expence of management.

Besides the burdening the respondent with payment of this annuity of *L. 20* to Janet Blackwall, which had it not been for the Doctor's declared will, would have fallen

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as a burden upon the heir, and not upon the executor, must show your Lordships, that Dr Johnston did not consider this general clause by which she became bound to perform all his deeds, as sufficient to transfer a burden upon her, that fell naturally to affect his heir; and as the lands were expressly burdened with the payment of Christian Hay's 6000 merks, it must naturally follow, that this general clause, viewing it in that light, could not be understood by him as transferring the payment of that debt from his heir upon the respondent.

Let it be supposed, that the deed 1747, whereby the petitioner has right to the fee of the lands, and the deed 1757, in favour of the respondent, had both been executed of the same date, but that the clause now founded upon, had not been inserted in the last of these deeds; how would matters have stood? The petitioner, as heir, would have been liable in payment of Christian Hay's 6000 merks, as a burden specially imposed upon the lands, and the respondent would only have been liable in payment of the proper moveable debts. Now, she is at a loss to discover how any difference can arise from the deed in her favour being posterior to the other, or from inserting in it the general clause now founded upon; for although, by this clause, every deed granted by the Doctor was approved of, and ready access given to his creditors or legatees against the respondent, as well as against the heir, yet none of these deeds were thereby rendered more large and beneficial to the grantees, than they were originally. The respondent is liable to fulfil, or, more properly speaking, she is taken bound to approve of the deed 1747, but then she is by no means bound to make it a better deed than it was originally; and as, at the time of its being granted, it was specially burdened with the payment of the 6000 merks in question, it must remain so burdened still; and whatever part of that sum the respondent is made to pay as being liable to the creditors

ditors or legatees, she must have relief of it, out of the heritable subjects upon which it was expressly secured and made a real lien.

The respondent humbly apprehends, that she might here with safety rest her plea for relief of this debt, and that upon the natural construction of the two deeds, your Lordships must undoubtedly be of opinion, that as the disposition of the land-estate by the Doctor to his heir, by which it was made a burden upon the lands themselves, never was recalled, the general clause in the after-settlement of the executry cannot import a transference of that burden from the one to the other.

In this view of the matter, there can be no room for a *questio voluntatis*. To enter into an investigation of intention from extraneous circumstances, is always dangerous, and what your Lordships will never go into, unless the natural meaning and import of a deed cannot be otherwise understood; at the same time, the respondent, were there *termini habiles* for such a question, apprehends, that the Doctor's intention was clear to continue this debt as a burden upon the disponee to the lands, notwithstanding the many ingenious arguments that have been urged upon the part of the petitioner, upon which she will now proceed to offer a few observations.

The petitioner, in the *first* place, contends, That the 6000 merks in question was not created a burden upon the land-estate by the settlement 1747, but upon Mr Thomas Blackwell, and the subjects disposed to him; and that as part of these subjects was first converted into cash, and thereafter stood in an heritable bond for L. 600 Sterling, when the deed 1757 was made, it is to be presumed, that when he took from his heir so considerable a part of the subjects comprehended in that settlement 1747, and conveyed, not only the heritable bond, but all other debts heritable and moveable due to him, under the anxious

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burdening clause already mentioned to the respondent, he certainly intended not to continue the 6000 merks a burden upon his heir and his land-estate.

This has in part already been answered; the only subjects taken from the disponent to the land-estate, were the adjudications mentioned in the disposition to Thomas Blackwell, which were transacted by Dr Johnston, who first drew two payments in part of the annualrent, and thereafter received the balance of principal and interest. And even though it should be allowed, that the petitioner is right, as to the sums which he alledges the Doctor received in virtue of these adjudications; and that the interest, which was two thirds of the whole, were to be brought *in computo*, your Lordships will observe, that the heir was previously relieved of a burden nearly equal to their amount, by the cancellation of the bond to Christian Blackwell, by which the lands were burdened with the payment of *L.* 200 Sterling to her, and an annuity of 100 merks yearly while she should remain unmarried. The Doctor therefore had, at this time, no reason to relieve the fee of his estate of the 6000 merks payable to Christian Hay, the only burden which then remained upon it.

The petitioner, in the *next* place, observes, That the intention of the maker of a deed, is to be gathered from circumstances as they stood at the time of making it; and that as the respondent had, by the settlement 1757, when it was made, *L.* 13. Sterling free out of the rents of the estate, and no less than *L.* 541. 6. 4. Sterling in money, over and above paying the 6000 merks in question, there is the strongest reason to believe, that Dr Johnston could not intend to leave the debt in question a burden upon his heir, who could have no access to the estate until the respondent's death.

But in answer to this, the respondent, in the *first* place, apprehends, That even although no after-deeds had been granted by Dr Johnston to diminish the free balance of
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executry, it would by no means follow from thence, that he intended to transfer a burden upon her, which he had formerly imposed upon the heir succeeding to him in his land-estate. It is well known to all the Doctor's relations, that the respondent was from her infancy to the day of his death his chief favourite. He took her into his family when but young, to be a companion to him. When she came of age, he gave her in marriage to a gentleman who was his most intimate friend and acquaintance; and as he, upon that occasion, acted the part of a parent to her, so he from that day forward, lived in the strictest friendship with her and her husband. This being the case, it would have been nowise surprising, that the Doctor should have allotted to her so large a portion of his effects, especially when it is considered, that, by the untimely death of her husband, she was left but meanly provided, with the burden of several young children, for whose aliment and education she was obliged to give down a considerable part of that small annuity which was settled upon her in her contract of marriage. Besides, had matters rested in this situation, although Christian Blackwell, Elisabeth Taylor, and the other persons to whom the Doctor afterwards granted bonds and annuities, would have been deprived of that share of his bounty which they have received; yet surely the heir of his land-estate would have had no reason to complain, because his situation would not thereby have been rendered worse than it was formerly; for as the adjudications contained in the disposition 1747 had been transacted before the deed in favour of the respondent was granted, so it was entirely accidental that at that time the Doctor had any money heritably secured; and the true matter of fact is, That, at the time of his death, he was possessed of no heritage whatever but his land-estate.

In the *next* place, the respondent cannot agree with the petitioner, that, in order to judge of Dr Johnston's intentions

tions with regard to the 6000 merk-debt in question, the situation in which the respondent would have been, had the Doctor died immediately after executing the deed of the 8th of March 1757, can at all come under consideration: For as, by that deed, he not only took her bound to perform every deed he *had* come under, but likewise those he *might* come under at any time during his life, it must be presumed, that he did at that time intend to burden her with such legacies as he should thereafter think proper to bestow upon his other relations; and, in that view of the case, every additional burden which he imposed upon his executry must be brought *in computo*, when a determination is to be made upon his will and intention with regard to the subjects out of which he meant that Christian Hay should receive her 6000 merks. Now, even from the petitioner's own calculation, it appears, that after payment of this sum of 6000 merks, and of the other burdens imposed upon the respondent by her uncle's deeds, the whole that she could possibly draw in consequence of the settlement in her favour, would amount only to L. 163, 10s. 10d. out of the executry, and an annuity of L. 2 Sterling yearly out of her liferent, to defray the expence of uplifting the rents, and paying the public burdens. But, at the same time, this calculation is not a little erroneous; for when credit is given to her for the aliment of the family to the next term after the Doctor's death, for the mournings which she necessarily purchased for herself, and those who were in family with him, and for the additional expence of processes incurred since the state was made out, upon which the petitioner's calculation proceeds, it will appear, that the free balance of the executry will not amount to more than the sum of £ 80. Sterling; a sum altogether inadequate to what it must be supposed the Doctor meant to give to his favourite niece, when compared with that which others of his relations, to whom he never shewed the same degree of affection, have received.

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But further, it will be proper here to observe, that the petitioner has endeavoured to mislead your Lordships, by alleging, that the land-estate, to the fee of which he is provided, is worth no more than L. 825 Sterling, for proof of which he refers to a letter from Mr Dunlop of Dunlop. How that letter was obtained, the respondent knows not; but she thinks she may at least venture to say, that, notwithstanding the length of the present tacks, the value put upon the lands is altogether inadequate to their worth. These tacks were granted by Dr Johnston when infirmity and age had rendered him an easy prey to designing people. And although it may be difficult to bring evidence of the fact, the respondent verily believes, that the person characterised in the petition, his favourite servant, received very considerable *douceurs*, upon getting him to sign these tacks. One thing is certain, that an estate, the rents whereof have only been raised a few shillings within the memory of man, which is the case with Dr Johnston's lands, must be worth a great deal more than 25 years purchase; and to show that the respondent does not talk only from conjecture, she herewith exhibits a letter from Major Alexander Dunlop, in which he agrees to pay 40 years purchase for these lands, according to the rent which they gave in the year 1753, which was only a few shillings short of what they pay at this day, even supposing the lands to be under tack.

Taking matters in this view, and supposing the estate to be sold only 15 years hence; it will appear, from a scheme or calculation hereto annexed, that after allowing the petitioner to rate Miss Hay's bond, and the interest upon it, even in the way he has calculated it at the end of 15 years, (long before which time, according to the ordinary course of things, both Mrs Hay and the respondent, who is herself upwards of 60 years of age, will, in all human probability, be dead), he will draw of clear money from a sale, no less than L. 501. 11. 1. Sterling, even although the lands,

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the tacks of which will be then near expired, should be reckoned of no greater value than they are at present. But upon the supposition that the lands were to be sold at present at 40 years purchase, the price which Mr Dunlop is willing to give for them, the adding the compound interest of the above sum of *L. 501. 11s. 1d.* after the same manner that the petitioner has computed the sum that the burden of Christian Hay's 6000 merks will stand him at the end of 15 years, will bring out a sum of *L. 1050, 10s. 9d.* Sterling to the heir at the end of that period.

Nor will it escape your Lordships observation, that the scheme annexed to the petition, which supposes that the heir will not get access to the lands for the space of fifteen years, from the present time, must be extremely erroneous. The space of 15 years is the utmost that can be allowed for the endurance of a double liferent, even when both the liferenters are in the prime of life, and when the liferent of both extends over the whole subject; but to put so high a value upon a total liferent, to one past sixty, and a partial liferent to another that is far advanced in years, (Mrs Hay's annuity, to which the petitioner is liable upon the respondent's death, amounting only to *L. 20*), is certainly proceeding upon false principles. The respondent apprehends, that at most ten years can only be allowed, as the term at the end of which the petitioner will, in all human probability, have full access to the lands; and as, according to his own calculation, he will only then have to pay on account of Miss Hay's 6000 merks *£ 644, 4 s.* Sterling, there will remain to him out of the value put upon the lands at present by Major Dunlop *£ 675, 16 s.*

Again, taking the matter in another view, were the petitioner at present to sell the lands, he would receive *£ 1320*, out of which, after payment of Christian Hay's 6000 merks, with the interest due at Whitsunday 1766, there would remain *£ 920*, to answer an annuity, which at most could never exceed *£ 33*; and, upon the death of the

the present annuitants, the petitioner would have to himself, after payment of the £ 200 Sterling provided to his sister Margaret, no less than £ 720, a sum very near double of that which has been left by Doctor Johnston to any one of his relations, though he had severals in a nearer degree.

For these reasons, it is believed, your Lordships will not imagine, that the petitioner has, from this his second observation, shewn any foundation for a presumption, that Dr Johnston, when he made the settlement 1757, in favour of his niece, intended to transfer upon her the burden of Miss Hay's 6000 merks.

The petitioner, in the *third* place, maintains, That the Doctor's intention to relieve him of this debt, is strongly inferred, by the petitioner's being left young, without any fortune, excepting a small sum liferented by his mother, and consequently without the ability of paying that debt otherwise than by borrowing upon the fee of the land-estate, which could not afford a sufficient security for so great a sum.

But this has been already answered, the respondent having shewn, that the fee of the land-estate will not only afford a sufficient security for payment of Miss Hay's 6000 merks, but will likewise yield to the petitioner a very considerable reversion. At the same time, she has reason to believe, that the petitioner's fortune, exclusive of Dr Johnston's succession, is by no means so contemptible as he pretends.

It is further said, That the will of a testator ought to be so explained as to appear rational, if the words will admit of it; but that the giving all to the executor, and nothing to the heir, upon whom a land-estate was settled, would be both irrational and absurd.

The respondent apprehends, that this observation will be fully answered by reversing it. The will of a testator
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ought undoubtedly to be so explained as to appear rational; but the giving all to an heir with whom the testator had little or no acquaintance, and the giving nothing to an executor who was his niece and chief favourite, especially when he never seems to have had in view the establishing of a family, or a perpetual representation, must appear both irrational and absurd; yet this will be the case, were the petitioner to prevail in the present question.

The petitioner further contends, That the irrationality and absurdity would be increased in this case, by the bond executed by the Doctor some months before his death, wherein he expressly obliges the petitioner, as the person he intended to succeed to his land-estate, to pay *L.* 200 to his sister, Margaret Blackwell, when he should be free of the annuities charged upon the land-estate; and that mankind cannot be presumed to intend a deceit or mockery, by such grave deeds executed *intuitu mortis*; but that Dr Johnston would have been deceiving and mocking both the petitioner and his sister, if it had not been his intention that the respondent should pay this debt.

The respondent must here observe, That the petitioner is now departing from his own rule, *viz.* That the intention of the maker of a deed, is to be gathered from circumstances as they stood at the time of making it. But, laying this aside, she cannot help thinking, that the mentioning this deed had better been omitted, as it is certain, that it was obtained from the Doctor by the means of the petitioner's mother, at a time when he was neither possessed of his memory nor judgment: Nay the deed itself, in which he supposes these his lands were burdened with annuities to the amount of *L.* 40 Sterling yearly, shews, that he was then very ignorant of the state of his own affairs. This being the case, the petitioner can have little difficulty of setting this deed aside, if he chuses to enter into a litigation with his sister upon that account: But, even supposing it
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to be altogether unexceptionable, it does not become payable until the succession opens fully, by the death of the annuitants ; and it has already been shewn, that he will then be under no difficulty of paying it out of the estate, and securing a very handsome reversion to himself : Nor is it altogether becoming in the petitioner, to term the Doctor's kindness to him *mockery* and *deceit*, when he succeeds to his land-estate upon easier terms than his nephew, Professor Blackwell, would have done, had matters rested upon the original settlement ; as had the Professor, and his mother, survived the Doctor, in that case, the Professor must not only have paid 6000 merks to Christian Hay, and L. 200 Sterling to Christian Blackwell, at the first term after the Doctor's death, but likewise an annuity of 100 merks to the latter of these ladies, while she remained unmarried, without being able to touch a farthing out of the estate, during his mother's life : whereas the petitioner is relieved both of the L. 200 Sterling, and the annuity of 100 merks provided to Christian Blackwell, and is not obliged to pay his sisters L. 200, until he attain the full possession of the lands, and even not at all, if he pleases.

The petitioner likewise observes, That the great distance of time intervening between the two settlements 1747 and 1757, the death of the liferenter and fiar of the estate under the first, and the material alterations introduced by the last of these settlements, all concur in rendering it at least exceedingly doubtful, whether the Doctor intended that the succession should be governed by the deed 1747 in any respect.

If by this the petitioner means to return to a plea which he maintained before the Lord Ordinary, and in his former petition, viz. That he is intitled to repudiate the deed 1747, and to take up the land-estate by a service, as heir to the Doctor his grand-uncle, the answer will be obvious. This deed was not conceived in the form of a settlement of

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succession; but as a direct conveyance in favour of Professor Blackwell: It therefore vested the personal right in him; and though this personal right might have been defeated, if the Doctor had so intended, yet, as no alteration was made by him, it remained in *hereditate jacente* of the professor, and can only be taken up by the petitioner as heir to him.

Had this question occurred with Professor Blackwell himself, it is impossible that he could have shaken himself free of the burdens imposed upon him, by repudiating the disposition, and taking the estate under the character of heir. This point is clearly ascertained in the Roman law; and in the case, Keith Turnbull against Andrew Kinear, observed by Lord Fountainhall, Dec. 29. 1711. your Lordships predecessors gave it full force, by finding, "That Andrew Kinear, the disponee might totally abstain; but that if he meddled with the heritage, he could not repudiate the burdens laid on it by the proprietor." And it is surely unnecessary to observe, That the petitioner can be in no better situation than his uncle, Professor Blackwell, would have been, had the question occurred with him.

The respondent having now considered the several arguments maintained upon the part of the petitioner, will only add, That his plea becomes the more unfavourable, that from the conception of Miss Hay's bond, as narrated in the petition, it would seem, that, in the case of her death without issue of her body, or without its being assigned in her contract of marriage, the 6000 merks, therein provided to her, must return entire to the petitioner himself, as the heir of Doctor Johnston. Were he only insisting, that the respondent should pay the interest of this sum of 6000 merks, in respect of her being provided to the liferent of the lands, and that the capital should remain a burden on the fee, his claim would not appear altogether so inequitable,

ble; though, at the same time, as her liferent is already fully exhausted, the respondent believes, your Lordships would pay little regard to it. But to insist that the respondent should pay the whole of this debt, out of the small remains of her uncle's executry, and that the estate, upon the expiry of the liferent, and the annuity to Mrs Hay, should go to the petitioner, free of any incumbrance, except the £ 200 allotted to his own sister, seems to her too absurd a claim to be countenanced by your Lordships. She will therefore conclude, in the hopes that you will have no difficulty in adhering to your former interlocutor.

In respect whereof, &c.

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Scheme of what the heir will draw, in different views.

	£.	s.	d.
The land at 40 years purchase, of L. 33 rent, will yield - - -	1320	0	0
Deduce Miss Hay's bond and interest, at Whitsunday 1781, in the way the heir has set down - - -	818	8	11
Remains of capital to the heir, on a sale at the end of 15 years - - }	501	11	1

But If he chuses to make the sale at present, this reversion, against Whitsunday 1781, will yield him as under, £ 1050. 10. 9.

To two years interest of the above £ 501. 11. 1. from Martinmas 1765, when the price will begin to bear interest, to Martinmas 1767 - -	50	3	0
Two years interest thereon to Martinmas 1769 - - -	5	0	1
To two years interest of principal sum, then due - - -	50	3	0
Carried over	105	6	1

	£	s.	d.
Brought over	105	6	1
To two years interest thereon to Martin- mas 1771 - - - -	10	10	7
Two years interest of principal, then due	50	3	0
	165	19	8
To two years interest thereon, to Martin- mas 1773 - - - -	16	11	11
Two years interest of principal, then due	50	3	0
	232	14	7
To two years interest thereon to Martin- mas 1775 - - - -	23	4	8
Two years interest of principal, then due	50	3	0
	306	2	3
To two years interest thereon, to Martin- mas 1777 - - - -	30	12	2
Two years interest of principal, then due	50	3	0
	386	17	5
To two years interest thereon, to Martin- mas 1779 - - - -	38	13	6
Two years interest of principal, then due	50	3	0
	475	13	11
To one year and a half's interest, due thereon at Whitsunday 1781 -	35	13	6
One and a half year's interest of princi- pal, then due - - - -	37	12	3
	548	19	8
The heir's reversion, or principal sum itself	501	11	1
	1050	10	9

